

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION       )  
FOR BENEFICIAL WATER USE PERMIT       )  
NO. 42358-s43D BY KENNETH AND       )  
KATHRYN COX                               )

FINAL ORDER

\* \* \* \* \*

An exception to the Proposal for Decision in this matter has been entered by the Consolidated Ditch Company.

The exception argues that the beaver ponds from which the Applicants' propose to divert water are supplied by tributaries to Rock Creek. The exception further states that the Applicants' sprinkler system will provide no return flow because of evaporation.

The Proposed Findings of Fact in this matter, specifically Nos. 5 and 15, addressed the fact that waters from the beaver ponds are tributary to Rock Creek. The consumptive nature of the Applicants' proposed irrigation use of this water was addressed in the Proposed Order in this matter. Specifically, Condition Nos. 2, 3 and 4 were placed on this permit to ensure that the Applicants' use does not adversely affect existing rights.

Therefore, the Proposal for Decision as entered on March 15, 1983, is hereby adopted in its entirety as Final.

FINAL ORDER

1. Application for Beneficial Water Use Permit No. 42358-s43D by Kenneth and Kathryn Cox is hereby granted to divert

**CASE # 42358**

20 gallons per minute up to 1.5 acre-feet per annum for sprinkler irrigation of 1/2 acre from April 15 to October 31, inclusive, of each year. The water shall be diverted by means of a pump from either of two beaver ponds located in lot 20, Wagon Wheel Estates, second filing, Section 2, Township 7 South, Range 20 East, Carbon County. The water shall be used on 1/2 acre in said lot 20.

2. This permit is issued subject to existing rights and any final determination of those rights as provided by Montana Law.

3. This provisional permit is subject to the authority of court appointed Water Commissioners, if and when appointed, to admeasure and distribute to the parties using waters in the source of supply the water to which they are entitled, including the waters granted in the provisional permit. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in this provisional permit.

4. After the Permittee has been notified by the Water Commissioner to cease diverting water during any irrigation season, the Permittee must contact and receive permission from the Water Commissioner before diverting water at any time during the remainder of that irrigation season, until such time as the Water Commissioner goes off duty.

5. The Permittee shall not use a pump any larger than a 1/2 horsepower pump nor more than one common garden sprinkler head for the appropriation of water pursuant to this permit.

6. The issuance of this provisional permit by the Department

shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this permit, nor does the Department in issuing the provisional permit in any way acknowledge liability for damage caused by the Permittee's exercise of this provisional permit.

NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedures Act by filing a petition in the appropriate court within thirty (30) days after service of the Final Order.

DONE this 14<sup>th</sup> day of April, 1983.

Gary Fritz  
Gary Fritz, Administrator  
Department of Natural  
Resources and Conservation  
32 S. Ewing, Helena, MT  
(406) 449 - 2872

David L. Pengelly  
David L. Pengelly, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

AFFIDAVIT OF SERVICE  
FINAL ORDER

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on April 15, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Kenneth and Kathryn Cox, Application No. 42358, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Kenneth and Kathryn Cox, 11 Altair Dr., Livingston, MT 59047
2. Rocky Fork Decreed Water Users, Rt. 2, Box 55, Red Lodge, MT 59068
3. Consolidated Ditch Co., c/o Beth Prinkki, P.O. Box 127, Roberts, MT 59070
4. Joe Regis, P.O. Box 308, Red Lodge, MT 59068
5. Pat Billingsley, Joliet, MT 59041
6. John Teini, Roberts, MT 59070
7. Keith Kerbel, Billings Field Office (inter-department mail)
8. Dave Pengelly, Hearing Examiner (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION

by Cheryl L. Wallace

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 14th day of April, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

Judy Lohr  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 3/1/85

CASE # 42358

BEFORE THE DEPARTMENT  
OF NATURAL RESOURCES AND CONSERVATION  
OF THE STATE OF MONTANA

\* \* \* \* \*

IN THE MATTER OF THE APPLICATION	)	
FOR BENEFICIAL WATER USE PERMIT	)	PROPOSAL FOR
NO. 42358-s43D BY KENNETH AND	)	DECISION
KATHRYN COX	)	

\* \* \* \* \*

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedures Act, a hearing in the above-entitled matter was held in Red Lodge, Montana, on January 18, 1983. The Applicants, Kenneth and Kathryn Cox appeared personally at the hearing. Appearing and presenting testimony on behalf of the Rocky Fork Decreed Water Users, Inc., were Fred Cole, John Teini, Everett Zumbrum, and Toivo Lantta. Appearing and presenting testimony on behalf of the Consolidated Ditch Co. was Curtis Schwend. The Department of Natural Resources and Conservation was represented by Mr. Keith Kerbel of the Billings Water Right Field Office.

STATEMENT OF THE CASE

On January 12, 1982, an Application for Beneficial Water Use Permit was filed with the Department of Natural Resources and Conservation by Kenneth and Kathryn Cox. This application sought

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20 gallons per minute up to 3 acre-feet per annum for new sprinkler irrigation purposes from April 15 to October 31, inclusive, of each year. The proposed point of diversion is in the NW $\frac{1}{4}$  NW $\frac{1}{4}$  NE $\frac{1}{4}$ , Section 2, Township 7 South, Range 20 East, M.P.M., Carbon County. The proposed place of use is on 1 acre in the NW $\frac{1}{4}$  NE $\frac{1}{4}$  of said Section 2.

Pertinent portions of this application were duly published for three successive weeks in the Carbon County News, a newspaper of general circulation printed and published in Red Lodge, Montana.

Three objections to the granting of this application were filed with the Department of Natural Resources and Conservation as follows:

1. The Consolidated Ditch Co. on May 19, 1982.
2. Rocky Fork Decreed Water Users, Inc. on May 19, 1982
3. Joe Regis on June 16, 1982

#### EXHIBITS

Neither the Applicant nor the Objector introduced any exhibits at the hearing.

The Department introduced the following exhibits into the record, to-wit:

D-1: A field report by Keith Kerbel regarding this application.

D-2: A summary of the Consolidated Ditch Co. from the Carbon County Water Resource Survey, page 42.

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- D-3: Table C-6 from a paper entitled Water Reservations and Water Availability in the Yellowstone River Basin prepared by Daniel A. Sobashinski and Diane Fitz Lozovy. This table is a summary of the excess flows in the Yellowstone River at Billings, Montana, under present conditions.
- D-4: Table C-5 of Water Reservations and Water Availability in the Yellowstone River Basin by Daniel A. Sobashinski and Diane Fitz Lozovy. Excess flows in the Clarks Fork at Edgar, Montana, under present conditions.
- D-5: Statement of Claim of existing Water Right No's. 031150 and 031152 with attached maps filed by Joe Regis.
- D-6: Water Commissioner records from Rock Creek from 1953 through 1977.
- D-7: DNRC Water Right listing by county and township, range, section pages 353 and 354 from the report of July 13, 1982. Also attached to this report are 25 Statement of Claims of existing Water Rights with the Consolidated Ditch named as the conveyance facility.

The Department's exhibits were introduced into the record with no objections.

Based on the information contained in the Department's file in this matter and the information presented at the hearing, the Hearing Examiner hereby makes the Findings of Fact, Conclusions of Law, and Order:

#### PROPOSED FINDINGS OF FACT

1. The Department of Natural Resources and Conservation has jurisdiction over the subject matter herein and over the parties

hereto, whether they have appeared or not.

2. The Applicants' intended use of water for irrigation purposes is a beneficial use.

3. The Applicants' maximum diversion will be the amount of water diverted by means of a one-half horse power pump with a 5/8 inch line running water through a single garden sprinkler head.

4. The Applicants' source of water are two beaver ponds located on the Applicants' property. The ponds are approximately 2/10 of an acre-foot and 3/100 of an acre-foot in volume.

5. Water which drains from the ponds is tributary to Rock Creek.

6. The beaver ponds are full year-round.

7. The correct point of diversion for the Applicants' proposed use is lot 20, Wagon Wheel Estates, second filing, Section 2, Township 7 South, Range 20 East, Carbon County.

8. The Applicants seek to divert up to a maximum of 1 1/2 acre-feet of water per year. The place of use is said lot 20, Wagon Wheel Estates, second filing.

9. Rock Creek is a decreed stream with a Water Commissioner generally on duty from June through Labor Day.

10. Water which spills out of the beaver ponds on the Applicant's property enters Rock Creek upstream from the point of diversion of the Consolidated Ditch.

11. Members of the Consolidated Ditch and Rocky Fork Decreed Water Users, Inc. have valid existing water rights from Rock Creek.



12. Based on the Water Commissioner's records from 1953 to 1977 for Rock Creek: in 6 years the Water Commissioner has turned off water prior to June 15; in 4 years the Water Commissioner has turned off water for the first time between June 16 and July 15; in 10 years the first water shutoff was after July 15, and in 5 years no water was shut off.

13. The Montana Dept of Fish, Wildlife and Parks has an instream flow reservation on Rock Creek.

14. There are no pending permits which would be adversely affected by the granting of this permit.

15. The waters which the Applicant seeks to divert from the beaver ponds are tributary to Rock Creek, however not all of these waters reach Rock Creek during the summer irrigation season.

#### PROPOSED CONCLUSIONS OF LAW

1. Montana Code Annotated 85-2-311 (1981) directs the Department of Natural Resources and Conservation to issue a Water Use Permit if the following conditions or criteria exist:

(1) there are unappropriated waters in the source of supply:

(a) at times when the water can be put to the use proposed by the applicant;

(b) in the amount the applicant seeks to appropriate; and

(c) throughout the period during which the applicant seeks to appropriate, the amount requested is available;

(2) the rights of a prior appropriator will not be adversely affected;

(3) the proposed means of diversion, construction, and operation of the appropriation works are adequate;

(4) the proposed use of water is a beneficial use;

(5) the proposed use will not interfere unreasonably with other planned uses or developments for which a permit has been issued or for which water has been reserved;

(6) an applicant for an appropriation of 10,000 acre-feet a year or more and 15 cubic feet per second or more proves by clear and convincing evidence that the rights of a prior appropriator will not be adversely affected;

(7) except as provided in subsection (6), the applicant proves by substantial credible evidence the criteria listed in subsections (1) through (5).

2. The Applicant's intended use of water for irrigation purposes is a beneficial use.

3. The Applicant's proposed means of diversion and construction are adequate.

4. There are unappropriated waters in the source of supply at times when the water can be put to the use proposed by the Applicant.

5. There are unappropriated waters in the source of supply in the amount the Applicant seeks to appropriate.

6. In some years there are unappropriated waters in the source of supply throughout the period during which the Applicant seeks to appropriate said amount of water.

7. The rights of a prior appropriator will not be adversely affected by the granting of this application if it is conditioned to protect those prior rights.

8. The proposed use will not interfere unreasonably with

other planned uses or developments for which a permit has been issued.

9. The proposed use will not interfere with other planned uses or developments for which water has been reserved.

10. The Applicant need not prove by clear and convincing evidence that the above criteria have been met since the application is for less than 10,000 acre-feet per annum or 15 cubic feet per second.

#### PROPOSED ORDER

WHEREFORE, based on these Findings of Fact and Conclusions of Law, the following Proposed Order is hereby issued:

1. Application for Beneficial Water Use Permit No. 42358-s43D by Kenneth and Kathryn Cox is hereby granted to divert 20 gallons per minute up to 1.5 acre-feet per annum for sprinkler irrigation of 1/2 acre from April 15 to October 31, inclusive, of each year. The water shall be diverted by means of a pump from either of two beaver ponds located in lot 20, Wagon Wheel Estates, second filing, Section 2, Township 7 South, Range 20 East, Carbon County. The water shall be used on 1/2 acre in said lot 20.

2. This permit is issued subject to existing rights and any final determination of those rights as provided by Montana Law.

3. This provisional permit is subject to the authority of

court appointed Water Commissioners, if and when appointed, to admeasure and distribute to the parties using waters in the source of supply the water to which they are entitled, including the waters granted in the provisional permit. The Permittee shall pay his proportionate share of the fees and compensation and expenses, as fixed by the District Court, incurred in the distribution of the waters granted in this provisional permit.

4. After the Permittee has been notified by the Water Commissioner to cease diverting water during any irrigation season, the Permittee must contact and receive permission from the Water Commissioner before diverting water at any time during the remainder of that irrigation season, until such time as the Water Commissioner goes off duty.

5. The Permittee shall not use a pump any larger than a 1/2 horsepower pump nor more than one common garden sprinkler head for the appropriation of water pursuant to this permit.

6. The issuance of this provisional permit by the Department shall not reduce the Permittee's liability for damages caused by the Permittee's exercise of this permit, nor does the Department in issuing the provisional permit in any

way acknowledge liability for damage caused by the Permittee's exercise of this provisional permit.

NOTICE

This Proposal for Decision is offered for the review and comment of all parties of record. Objections and exceptions must be filed with and received by the Department of Natural Resources and Conservation on or before April 8, 1983, 1983.

DONE this 15th day of March, 1983.

David L. Pengelly  
Dave Pengelly, Hearing Examiner  
Department of Natural Resources  
and Conservation  
32 S. Ewing, Helena, MT 59620  
(406) 449 - 3962

**CASE #** 42358

AFFIDAVIT OF SERVICE  
PROPOSAL FOR DECISION

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

Cheryl L. Wallace, an employee of the Montana Department of Natural Resources and Conservation, being duly sworn on oath, deposes and says that on March 22, 1983, she deposited in the United States mail, certified return receipt mail, an order by the Department on the Application by Kenneth and Kathryn Cox, Application No. 42358, for an Application for Beneficial Water Use Permit, addressed to each of the following persons or agencies:

1. Kenneth and Kathryn Cox, 11 Altair Dr., Livingston, MT 59047
2. Rocky Fork Decreed Water Users, Rt. 2, Box 55, Red Lodge, MT 59068
3. Consolidated Ditch Co., c/o Beth Prinkki, P. O. Box 127, Roberts, MT 59070
4. Joe Regis, P. O. Box 308, Red Lodge, MT 59068
5. Pat Billingsley, Joliet, MT 59041
6. John Teini, Roberts, MT 59070
7. Keith Kerbel, Billings Area Office Supervisor, DNRC, (inter-department mail)
8. Dave Pengelly, Hearing Examiner, DNRC (inter-department mail)

DEPARTMENT OF NATURAL RESOURCES AND  
CONSERVATION


by Cheryl L. Wallace

STATE OF MONTANA                    )  
  ) ss.  
County of Lewis & Clark )

On this 10th day of March, 1983, before me, a Notary Public in and for said state, personally appeared Cheryl L. Wallace, known to me to be the Hearings Recorder of the Department that executed this instrument or the persons who executed the instrument on behalf of said Department, and acknowledged to me that such Department executed the same.

**CASE # 42358**

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

  
\_\_\_\_\_  
Notary Public for the State of Montana  
Residing at Montana City, Montana  
My Commission expires 3/1/85

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